Osman bin Mohd Idris & Ors v Ketua Pengarah Perkhidmatan Awam Malaysia

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–01–196 OF 1995

GOPAL SRI RAM, ABDUL AZIZ MOHAMAD AND MOHD GHAZALI JJCA

8 JUNE 2006

Administrative Law — Rights and liabilities of public servants — Contract of employment between government and public officer — Discrimination — Consent to unlawful discrimination — Allegation that government servants were discriminated against — Whether consent to be discriminated was good defence — Whether consent to opt for better paying scheme amounted to waiver or abandonment of previous grievances regarding entitlement to higher rank of service

The appellants were Government servants. They joined the service as Assistant Protectors of Aborigines in the Department of Aborigines. There was an advertisement for the position in *The New Straits Times* of 20 October 1963. Initially, the advertised qualification for the job was a Pass Degree from a recognised university. Later, the Public Services Department reduced the entry requirements to include persons holding a Higher School Certificate. The appellants qualified and were appointed. Their complaint was that in November 1965 through Service Circular 8/65 ('CS 8/65) they were downgraded and that this amounted to a reduction in rank. They said that they ought to have been treated in the same way as those service members who had a Pass Degree.

The appellants argued that the respondent had committed acts of discrimination against them, in that they were discriminated under the Cabinet Salaries Report which was brought out vide Service Circular 23/77. Pursuant to that Circular, Pass Degree schemes which were reduced in status in circumstances similar to the appellants were reinstated but the same benefit was not conferred on the appellants. For the respondent it was argued that: (1) there was never a Graduate Scheme for the posts held by the appellants; (2) no promise was ever held out to the appellants that they would be placed in the Graduate Scheme; and (3) the appellants had in 1970 opted into the Suffian Scheme of service. They signed a contract in 1970 under the Suffian option placing them in the non-graduate scheme. They could now ask to be released from that contract and to be restored to their original position.

The High Court dismissed the appellants' claim. The appellants contended that their non-inclusion in CS 8/65 was unlawful for two reasons, ie: (1) that it was an unlawful discrimination; and (2) that it was a reduction in rank without an opportunity of being heard. The senior federal counsel argued that the appellants' acceptance of the option for the Suffian Scheme created a new contract between the appellants and the Government and that with the acceptance of the new contract the

A appellants were deemed to have abandoned whatever rights that they had under the old contract and could not now sue for them.

Held, dismissing the appeal:

B (1) (per **Gopal Sri Ram JCA**, **Mohd Ghazali JCA** concurring) The purpose of asking Degree Holders to apply in the advertisement was to give them the status that their qualification demanded. There was no doubt whatsoever that the respondent held out the post in question to have a Graduate status (see para 3).

C (2) (per **Gopal Sri Ram JCA**, **Mohd Ghazali JCA** concurring) The appellants were applying for a post as advertised and as per the terms of the advertisement that they were to be at the same level as Pass Degree holders. The advertisement and the Gazette was the promise held out to applicants (including the appellants) for the jobs in question and on the strength of which the appellants D gained entry into the service (see para 4).

(3) (per **Gopal Sri Ram JCA**, **Mohd Ghazali JCA** concurring) Free consent is a defence to a complaint of unlawful discrimination. By opting into the non-graduate scheme under the Suffian Scheme, the appellants gained financially. They could not now complain (see para 6).

E (4) (per **Abdul Aziz JCA** dissenting) The appellants' ranking or salary was not, by their non-inclusion in the Service Circular, made any lower than the ranking and salary that they enjoyed when they were appointed and before the Service Circular was issued. Their grievance was that they were being denied the revised salary scale that holders of other posts in what they considered the same F service enjoyed. That was not a reduction in rank (see para 26).

(5) (per **Abdul Aziz JCA** dissenting) But opting for the Suffian Scheme did not mean that the appellants were satisfied with what they obtained thereby to the extent that they abandoned whatever claim they had that would give them an even better salary scale under the Suffian Scheme that they opted for. G To support such a deeming of abandonment of previous rights there must be reliance on some provision of CS 2/77 that implemented the scheme or some conduct of the appellants other than the mere exercise of their option under that Service Circular, but there had been no such reliance. There was no provision in CS 2/77 that said or implied that acceptance of the option was a H waiver or abandonment of previous grievances (see para 35).

[Bahasa Malaysia summary

I Perayu-perayu merupakan kakitangan Kerajaan. Mereka telah berkhidmat sebagai Pembantu Pelindung Orang asli di Jabatan Orang Asli. Terdapat satu iklan untuk jawatan itu dalam *The New Straits Times* bertarikh 20 Oktober 1963. Pada mulanya, kelayakan yang diiklankan untuk jawatan itu hendaklah mempunyai Kelulusan Ijazah daripada universiti yang dikenali. Kemudian, Jabatan Khidmat Awam telah merendahkan kelayakan kemasukan kepada mereka yang termasuklah pemegang Sijil Tinggi Persekolahan. Perayu-perayu sememangnya layak dan telah dilantik.

Aduan mereka adalah bahawa pada bulan November 1965 melalui Pekeliling Perkhidmatan 8/65 ('CS 8/65) mereka telah diturunkan pangkat dan ia membentuk satu penurunan pangkat. Mereka berkata bahawa mereka sepatutnya dianggap dengan cara yang sama seperti kakitangan lain yang mempunyai Kelulusan Ijazah.

Perayu-perayu berhujah bahawa responden telah melakukan tindakan diskriminasi terhadap mereka, di mana mereka telah didiskriminasikan di bawah Laporan Gaji Kabinet yang dikemukakan melalui Pekeliling Perkhidmatan 23/77. Menurut Pekeliling itu, skima Kelulusan Ijazah yang telah diturunkan pangkat dalam keadaan yang sama dengan perayu-perayu telah dikembalikan jawatan tetapi faedah sama tidak diberikan kepada perayu-perayu. Bagi pihak responden, ia telah dihujahkan bahawa: (1) tidak pernah ada skima Siswazah untuk jawatan yang dipegang oleh perayu-perayu; (2) tiada janji diberikan kepada perayu-perayu bahawa mereka akan diletakkan dalam skima Siswazah; dan (3) perayu-perayu telah pada tahun 1970 dipilih untuk memasuki Skima Suffian untuk berkhidmat. Mereka telah menandatangani kontrak pada tahun 1970 di bawah pilihan Suffian yang meletakkan mereka dalam skima bukan siswazah. Mereka sekarang boleh bertanyakan untuk membebaskan diri daripada kontrak tersebut dan dikembalikan kepada jawatan asal mereka.

Mahkamah Tinggi telah menolak tuntutan perayu-perayu. Perayu-perayu berhujah bahawa ketidakmasukan mereka dalam CS 8/65 adalah tidak sah kerana dua sebab, iaitu: (1) ia merupakan satu diskriminasi yang tidak sah; dan (2) bahawa ia satu penurunan pangkat tanpa peluang untuk didengar. Peguam kanan persekutuan berhujah bahawa penerimaan perayu-perayu terhadap pilihan Skima Suffian membentuk kontrak baru antara perayu-perayu dan Kerajaan dan dengan penerimaan kontrak baru itu perayu-perayu dianggap telah meninggalkan pa-apa hak yang mereka dapat di bawah kontrak lama dan sekarang tidak boleh menyaman untuknya.

Diputuskan, menolak rayuan tersebut:

(1) (oleh **Gopal Sri Ram HMR**, **Mohd Ghazali HMR** bersetuju) Tujuan meminta Pemegang Ijazah memohon dalam iklan itu adalah untuk memberikan mereka jawatan yang kelayakan yang dituntut. Tidak diragukan bahawa responden memegang jawatan yang dipersoalkan yang mempunyai status Siswazah (lihat perenggan 3).

(2) (oleh **Gopal Sri Ram HMR**, **Mohd Ghazali HMR** bersetuju) Perayu-perayu memohon untuk jawatan seperti yang diiklankan dan seperti terma-terma dalam iklan yang mereka akan diletakkan sama taraf dengan pemegang Kelulusan Ijazah. Iklan dan Warta itu merupakan janji yang diberikan kepada pemohon (termasuklah perayu-perayu) untuk jawatan yang dipersoalkan dan berdasarkan itu perayu-perayu mendapat masuk dapam perkhidmatan (lihat perenggan 4).

(3) (oleh **Gopal Sri Ram HMR**, **Mohd Ghazali HMR** bersetuju) Persetujuan bebas merupakan satu pembelaan terhadap satu aduan diskriminasi yang menyalahi undang-undang. Dengan memilih memasuki skima bukan siswazah di bawah Skima Suffian, perayu-perayu mendapat kelebihan dari segi gaji. Mereka tidak boleh sekarang membuat aduan (lihat perenggan 6).

(4) (oleh **Abdul Aziz HMR** menentang) Pangkat atau gaji perayu-perayu bukan, dengan ketidakmasukan mereka dalam Pekeliling Perkhidmatan, diturunkan lebih daripada pangkat atau gaji yang mereka menikmati apabila mereka dilantik dan sebelum Pekeliling Perkhidmatan itu dikeluarkan. Ketidakpuasan hati mereka adalah bahawa mereka telah dinafikan skima semakan gaji yang mana pemegang jawatan lain yang mereka anggap perkhidmatan yang sama menikmati. Itu bukan satu penurunan pangkat (lihat perenggan 26).

(5) (oleh **Abdul Aziz HMR** menentang) Namun dengan memilih Skima Suffian tidak bermaksud yang perayu-perayu berpuas hati dengan apa yang mereka peroleh sehingga melepaskan apa-apa tuntutan yang mereka ada yang akan memberikan mereka skala gaji yang lebih baik di bawah Skima Suffian yang telah mereka pilih. Untuk menyokong pelepasan hak-hak sebelumnya hendaklah bergantung kepada beberapa peruntukan CS 2/77 yang melaksanakan skima itu atau sedikit sebanyak perlakuan perayu-perayu selain daripada menggunakan pilihan mereka di bawah Pekeliling Perkhidmatan tersebut, tetapi tidak terdapat kebergantungan itu. Tiada peruntukan dalam CS 2/77 yang mengatakan atau secara tersiratnya bahawa penerimaan pilihan itu adalah suatu penepian atau pelepasan ketidakpuasan hati sebelumnya (lihat perenggan 35).]

Notes

For a case on contract of employment between government and public officer, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 721.

Cases referred to

Ahmad Tajuddin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang [1997] 1 MLJ 241 (refd)
Attorney-General of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629 (refd)
Government of Malaysia v Rohaya bte Mohd Majzub & Ors [1989] 1 MLJ 96 (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1 (refd)
Union of India v Anglo-Afghan Agencies Ltd AIR 1968 SC 718 (refd)

Legislation referred to

Federal Constitution art 135(2)
Public Service Tribunal Act 1977 s 2

Appeal from: Originating Summons No R1–24–19 of 1993 (High Court, Kuala Lumpur)

KL Wong (KL Wong & Lim) for the appellants.
Azizah bte Hj Nawawi (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Gopal Sri Ram JCA (delivering majority judgment):

[1] This is a simple case. It gives rise to a service issue. The facts are straightforward. I will now state them. The appellants are all Government servants.

They joined the service as Assistant Protectors of Aborigines in the Department of Aborigines. There was an advertisement for the position in the New Straits Times of 20 October 1963. Initially, the advertised qualification for the job was a Pass Degree from the University of Malaya or any other recognised University. Later, the Public Services Department reduced the entry requirements to include persons holding a Higher School Certificate. The appellants qualified and were appointed. Their complaint is that in November 1965 they were downgraded and that this amounts to a reduction in rank. They say that they ought to have been treated in the same way as those service members who had a Pass Degree. They also say that in consequence they never had the prospect of a promotion because they were kept at the Higher School Certificate level all the time. The appellants argue that the respondent has committed acts of discrimination against them.

[2] In the first place, they ought to have been given an option under the Suffian Scheme of holding their posts as 'personal to holder' which is something other Government servants were granted. However, the offer was never made to them. In the second place, they were discriminated under the Cabinet Salaries Report which was brought out vide Service Circular 23/77. Pursuant to that Circular, Pass Degree schemes which were reduced in status in circumstances similar to the appellants were reinstated. The same benefit was not conferred on the appellants. They argue that under the said Service Circular they were entitled to be placed respectively on the A22 level of the Senior Timescale grade as Assistant Protectors of Aborigines, on the A12 Special Grade as Protectors of Aborigines and on the A10 Superscale G as Senior Protectors of Aborigines. But this was not done.

[3] For the respondent, three arguments are advanced. First, it is argued that there was never a Graduate Scheme for the posts held by the appellants. It is said that just because a Pass Degree qualification was sought that did not make it a Graduate Scheme. A more preposterous argument I have not heard. The purpose of asking Degree Holders to apply was to give them the status that their qualification demanded. Otherwise, why would that requirement be specified both in the advertisement and in the Gazette that carried the post? There is no doubt whatsoever in my mind that the respondent held out the post in question to have a Graduate status.

[4] The second argument is that no promise was ever held out to the appellants that they would be placed in the Graduate Scheme. Learned senior federal counsel referred us to a document dated 29 May 1963 to show that the parties were merely negotiating. I must be forgiven if I express my astonishment at this argument. Here, you have the appellants applying for a post as advertised and as per the terms of the advertisement, they were to be at the same level as Pass Degree holders. The advertisement and the Gazette is the promise held out to applicants (including the appellants) for the jobs in question and on the strength of which the appellants gained entry into the service. There is again no doubt in my mind that there was a holding out to the appellants which created a legitimate expectation in them that they would enjoy the benefits of the Graduate level of service. It is no different from the representation made by the senior immigration official in *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629. The doctrine of legitimate expectation

A has both a procedural and a substantive dimension. See, *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1. As Shah J observed in *Union of India v Anglo-Afghan Agencies Ltd* AIR 1968 SC 718:

> B Under our jurisprudence, the government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen on an ex parte appraisement of the circumstances in which the obligation has arisen.

C **[5]** The respondent's third argument is this. The appellants had in 1970 opted into the Suffian Scheme of service. They signed a contract in 1970 under the Suffian option placing them in the non-graduate scheme. There is no dispute about that. They cannot now ask to be released from that contract and to be restored to their original position. This is, I think, an unanswerable argument.

D **[6]** You must not forget that the nub of the appellants' case is unlawful discrimination by the respondent. One of the essential ingredients of the wrong of unlawful discrimination is injury suffered by the victim. See, *Ahmad Tajuddin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang* [1997] 1 MLJ 241. There can be no harm where there is free consent. Hence, in my judgment, free consent is a defence to a complaint of unlawful discrimination. There may be very good reasons for a E person to consent to discrimination. You may agree to be discriminated against in one respect because you may be gaining in another. Take this very case. By opting into the non-graduate scheme under the Suffian Scheme, the appellants gained financially. That is why they probably took the conscious decision to sign the contract. They cannot now complain.

F **[7]** For the reasons already given, this appeal must fail. I would accordingly dismiss it and confirm the orders made by the High Court. A word about costs, though. The appellants thought that they had been wronged in point of their pensions. That is why they brought the action. There are many others who are in like position. The appellants have served the Government loyally for many years. The fact that they G have lost the appeal and the suit in the court below is punishment enough for them. This is, in my judgment, a case in which justice demands that there be no order as to costs here and below. I would so order and direct the deposit in court to be refunded to the appellants. Before concluding, I would like to express my gratitude to learned senior federal counsel, Cik Azizah for her invaluable assistance in this H appeal. Her clear and well formulated arguments have made light my task in writing this judgment.

[8] My learned brother Mohd Ghazali JCA has seen this judgment in draft and has expressed his agreement with it.

I **Abdul Aziz Mohamad JCA (delivering dissenting judgment):**

[9] At a meeting on 21 February 1961 of representatives of the Ministry of Interior, the Department of Aborigines ('DOA'), the Treasury and the Federal

Establishment Office ('FEO', now the Public Services Department), it was decided, among other things, that the post of Assistant Protector of Aborigines ('APA') 'should be a Pass Degree Service and it should therefore be on a salary scale applicable to holders of Pass Degree'. It was a meeting about the structure of the establishment and administration of the DOA. At that time the DOA was not a permanent department and appointment to the post of APA was not of a permanent and pensionable nature but was on renewable contract on a temporary basis. This decision was notified to the Public Services Commission ('PSC') by the respondent, then known as the Ketua Pegawai Perjawatan, Malaysia (or Principal Establishment Officer, Malaysia), in a letter dated 29 May 1963, in which the respondent also stated that the salary scale for the post of APA should be B17. That salary scale commenced at RM324 and ended at RM700.

[10] At a meeting on 8 July 1963 of representatives of the Ministry, the DOA, the Treasury, the FEO and the PSC 'to discuss the outstanding issues arising from the decision to make the Department of Aborigines a permanent Department', it was agreed, among other things, that the entry qualification for the post of APA 'remains unchanged, ie a Pass degree in any subject for direct appointment, or HSC with three years' experience, or School Certificate with five years' experience'.

[11] At the end of October 1963, the PSC advertised invitations for applications for permanent and pensionable appointment to the post of APA. The salary scale given in the advertisement was the B17 salary scale (RM324–RM700). As to qualification, the advertisement said: 'Applicants must have a Pass Degree of the University of Malaya or any other recognised university. Serving officers including those on contract, who have passed the Higher School Certificate and have had three years experience or the School Certificate and five years experience of jungle duties or work with aborigines will also be eligible to apply'. At that time there were nine posts of APA on the permanent establishment.

[12] The appellants were among the eight persons who responded to the invitation and were appointed to the post of APA, a Division II post. They were interviewed on 21 December 1963. Their appointments took effect on various dates, the earliest being 2 April 1964 in the case of the fifth appellant and the latest being 16 April 1965 in the case of the fourth appellant. The eight were the first batch of APAs appointed to the permanent establishment. They did not have a Pass Degree. They qualified as serving officers possessing the Higher School Certificate (or School Certificate) and the required experience. Their salary scale was B17 (RM324–RM700).

[13] In a letter dated 26 April 1965 in connection with another advertisement for the recruitment of APAs ('the second recruitment'), the Secretary to the PSC informed the Commissioner of Aborigines that the first advertisement of October 1963 was to meet a special situation and was for a special recruitment to enable serving officers to be considered for appointment and should not be treated as something normal. It would appear from the letter that all that was said in reference to a draft of the advertisement, which the Secretary to the PSC asked the

Commissioner to send to the FEO for its reconsideration, but it is not apparent from the letter what was in the original draft, which is not in evidence, that caused the PSC Secretary to make those remarks.

[14] On 4 May 1965, the respondent issued Service Circular No 8 of 1965 entitled 'REVISION OF SALARY SCALES OF PASS DEGREE SERVICES' ('CS 8/65'). It announced in the first paragraph an agreement in the National Whitley Council (Divisions I–IV) for the revision of the salary scales of 'the services requiring Pass Degree of the University of Malaya or its recognised equivalent as entry qualifications'. For Division II, the revised salary scale was one that would commence at RM420 and end at RM812. The revision was to have retrospective effect from 1 December 1963, before the appellants were appointed.

[15] The services to which the revised salary scale was to apply were, notwithstanding the general description in the first paragraph, specifically circumscribed by paragraph 2, which said:

> 2. The revised salary scale shall apply to the services listed in the Schedule to this Circular. Other services may be added to the Schedule as appropriate from time to time.

The Schedule listed 21 names of posts and the Departments or Ministries to which they belonged. It did not include the post of APA. It was because of that non-inclusion that the appellants were to bring the action that led up to this appeal.

[16] In compliance with the direction in the PSC Secretary's letter of 26 April 1965, on 5 May 1965 the Commissioner of Aborigines wrote to the respondent to forward the amended advertisement for the second recruitment. The Commissioner referred to the new 'Pass Degree' salary scale mentioned in a letter from the respondent entitled 'Revision of Salary Scales of Pass Degree Services' dated 9 June 1964, which must have been a precursor of CS 8/65. He requested that the new salary scale of RM420 - RM812 be specified in the advertisement. The reason that he gave was that, according to the decision of the meeting of 8 July 1963, the post of APA required a Pass Degree.

[17] The respondent replied by a letter dated 5 November 1965. It may be inferred from the contents of that letter that the amended advertisement that the Commissioner had forwarded specified the entry qualifications in substantially the same terms as in the advertisement of October 1963, that is, a Pass Degree or, for serving officers, HSC or SC with the necessary experience. The reply was that in past years the required qualification was up to (setakat) HSC or SC with several years' experience. In view of that qualification and the duties of an APA, the respondent's office was of opinion that the post did not require a Pass Degree. Therefore the advertisement was amended by excluding the requirement of a Pass Degree. At that stage, that response of the respondent's was in relation to the second recruitment and was not yet in relation to any question about the position of the appellants.

[18] In 1970, the appellants opted for the revised salary scheme and conditions of service for officers in the public service of the Suffian Scheme, which was implemented by Service Circular No. 2 of 1977 dated 31 March 1977 ('CS 2/77').

Paragraphs 56 to 57 of the report of the Suffian Salaries Commission dealt with Pass Degree Services, which included the posts listed in CS 8/65 and whose salary scale was, by virtue of that Service Circular, RM420–RM812. The Commission recommended the discontinuance of Pass Degree Services because they considered that a Pass Degree was not essential for the satisfactory execution of the duties involved. The Commission considered that most of the posts involved could properly come within the executive cadre, with the HSC as the entry qualification. A new salary scale (Common User Scale 22) was recommended for the services concerned but as it was thought that some serving officers might not wish to convert to the new scale, a personal-to-holder scale of RM400–RM1,150 was proposed for them. The appellants, as I gather from pp 280–330E of the record of appeal, were not placed on the personal-to-holder scale but on the less favourable scale of RM400–RM1,000.

[19] On 22 September 1970, the Director General of the DOA (formerly the Commissioner of Aborigines) wrote to the respondent in relation to the eight APAs of the first batch, which included the appellants, to propose that the post of APA be included in CS 8/65 by virtue of paragraph 2 thereof. The request was supported by the contention that by virtue of the decision of 8 July 1963 and the terms of the advertisement of October 1963, the post of APA was in the Pass Degree Service and the eight were appointed to posts in the Pass Degree Service. The DG of the DOA said that for some unknown reason the post of APA was not included in the Schedule to the Service Circular.

[20] The respondent replied by a letter dated 16 October 1970. The reason for the non-inclusion of the post of APA in CS 8/65 was given in paragraph 3. The reason given was that the post of APA was not a post in the Pass Degree Service. The reason why the post of APA was not a post in the Pass Degree Service was given in paragraph 2. In that paragraph, the respondent stated that making the post of APA a post in the Pass Degree Service was only a proposal but the post was not made a post in the Pass Degree Service (meaning that the proposal was not implemented) because, as already explained in the respondent's letter dated 5 November 1965, after considering the duties of the post and the qualification required for past recruitments, his Department was of opinion that the post of APA did not require a Pass Degree. It ought to be noted that the reasons given for not making the post of APA a post in the Pass Degree Service and therefore not listing it in CS 8/65 referred back to those given in the letter of 5 November 1965.

[21] On 11 December 1970, the DG of the DOA wrote to the respondent to urge that the matter be reconsidered for the benefit of the eight APAs. It was pointed out that the decision in the respondent's letter of 5 November 1965 was in connection with the second recruitment and should be applied to intakes after that date, but should not be applied to the eight APAs who had been appointed two years earlier. It was also pointed out that the decision of 5 November 1965 to reduce the qualification for the post of APA was made after the date of CS 8/65.

[22] The respondent gave his reply in a letter dated 29 December 1970. I quote paragraph 2 of the letter according to the English translation of it contained in the record of appeal:

> 2. Prior to the draft advertisement which was approved by this department FEO. 8598/Pt. 125/16 dated 5 November 1965, there were advertisements for the post of Assistant Protector of Aborigines which stated the Pass Degree as one of the requirements for these posts. Based on experience, it was found that no candidates with this qualification had even been appointed as Assistant Protector of Aborigines. Usually candidates with School Certificates were appointed to fill these posts. As to [sic] the duties and responsibilities of Assistant Protector of Aborigines could be handled by those lower than Pass Degree qualification, our department believes that these posts no longer require Pass Degree as an entry qualification. Meanwhile this department has made a decision that these posts should not be classified as posts in a Pass Degree service. Therefore the current salary scale for this post is not revised. By means of this decision, as explained, this means that, the serving Assistant Protector of Aborigines at that time, inclusive of 8 Assistant Protector of Aborigines as explained by you are therefore not classified under the Pass Degree service, so are those Assistant Protector of Aborigines appointed after 5 November 1965.

[23] In 1989, the eight APAs brought their case to the Public Service Tribunal established under the Public Service Tribunal Act 1977. That was after they had left the public service either on compulsory or optional retirement or, in the case of the third appellant, by resignation. Their case was dismissed by the Tribunal on 9 May 1991 on the ground that their claims, which arose from their non-inclusion in CS 8/65, did not come within the scope of 'anomaly' as defined in s 2 of the Act.

[24] By an originating summons dated 1 March 1993, the appellants and another (the third plaintiff), who subsequently passed away, brought their case to the High Court. Although they professed in the originating summons to seek declarations, what were listed as the declarations sought were, by their form and wording, in effect, orders that they be given the benefit of the revised salary scale of CS 8/65 and be paid the consequential arrears of benefits. It was substantially what they had sought from the Tribunal. Put in simple terms, in effect the arrears are to be calculated by supposing that the appellants had been on the revised salary scale on the dates of their respective appointments and reckoning what financial benefits they would, taking into account all subsequent revisions of salary, have received over subsequent years by way of emoluments, allowances, pensions and employers' contributions to the Employees' Provident Fund and other benefits, and then deducting what they had actually received. The difference is the arrears. The detailed computation of the arrears is given in exhs 01 to 05 to the appellants' affidavit dated 26 September 2001 filed in this appeal.

[25] The High Court dismissed the appellants' claim, holding that the non-inclusion of the appellants in CS 8/65 was a management prerogative and did not amount to a reduction in rank.

[26] From the appellants' written submission in this appeal, it would appear that the appellants contend that their non-inclusion in CS 8/65 was unlawful for two reasons. One reason is that it was an unlawful discrimination. The other reason is that it was a reduction in rank without an opportunity of being heard, contrary to art 135(2) of the Federal Constitution. I reject the second reason. The appellants were not reduced in rank. Their ranking or salary was not, by their non-inclusion in the Service Circular, made any lower than the ranking and salary that they enjoyed when

they were appointed and before the Service Circular was issued. Their grievance lay in being denied the revised salary scale that holders of other posts in what they considered the same service enjoyed. That was not a reduction in rank.

[27] As to discrimination, the respondent has given several responses. In oral submission, the learned Senior Federal Counsel said that there was never any promise held out by the respondent that the post of APA would be in the Pass Degree Service. She said that the respondent's letter of 29 May 1963 carried no promise but was part of a negotiation. The facts already set out clearly show that it had originally been decided that the post of APA should be in the Pass Degree Service. The respondent's letter of 29 May 1963 conveyed that decision to the PSC.

[28] The Senior Federal Counsel also submitted in her oral submission that there never was a graduate scheme specified in the advertisements for application for the post of APA, by which I take her to mean that the advertisements never specified a Pass Degree requirement for the post, which is something akin to what the respondent said in his letter dated 5 November 1965 to the Commissioner of Aborigines. That is not true. The advertisement to which the appellants responded did require a Pass Degree as a basic requirement.

[29] Before I deal with the Senior Federal Counsel's written submission on the allegation of discrimination, I feel that it is necessary to review and make observations on the various replies given by the respondent before the appellants brought their case to the Tribunal or the High Court, on the question of Pass Degree Service in relation to the post of APA. The first reply was in the letter dated 5 November 1965, in which the respondent said that his office was of opinion that the post of APA did not require a Pass Degree because in the past the extent of qualification was HSC or SC and because the duties of the post did not require a Pass Degree. The former reason flew in the face of the advertisement that resulted in the appellants' appointment. The latter reason furnished nothing much by way of reason for the opinion that the post of APA did not require a Pass Degree as the opinion already meant that the duties of the post did not require a Pass Degree qualification to enable them to be carried out. As has been observed, that opinion was given in relation to the second recruitment that was then contemplated, for which the draft advertisement was consequently amended to remove the requirement of a Pass Degree, and was not yet in relation to any question about the position of the appellants. I would further remark that the letter did not say when that opinion was formed. The words used were *'pejabat ini berpendapat'*, which leave the impression that the opinion was formed contemporaneously with the letter.

[30] The next reply was in the respondent's letter dated 16 October 1970 and was in response to a proposal that the post of APA be included in CS 8/65, which was in relation to the eight APAs, including the appellants. The reply was to explain why the post of APA was not listed in the Service Circular, which logically should be a reason that existed before the date of the Service Circular. But the underlying reasons that were given referred back to the reasons given in the respondent's letter of 5 November 1965, which, as I remarked, leaves the impression that they were formed contemporaneously with it. For those reasons, explained the respondent in the letter

of 16 October 1970, the post of APA was not made a post in the Pass Degree Service. The respondent said that the idea of making the post of APA a post in the Pass Degree Service was only a proposal. That flew in the face of the facts, which show that there was a decision on 21 February 1961 that the post of APA be a post in the Pass Degree Service and that the decision was implemented at the meeting of 8 July 1963 and in the advertisement in October 1963.

[31] The final reply was by the respondent's letter dated 29 December 1970 in response to a request for reconsideration from the Department of Aborigines. I have quoted the reply in full. This time there was no assertion that in the past the extent of qualification for the post of APA was only HSC or SC, as was stated in the letter of 5 November 1965, or that the idea of the post being in the Pass Degree Service was only a proposal, as was stated in the letter of 16 October 1970. This time it was admitted that there were advertisements stating a Pass Degree as a requirement for the post of APA. This time the fact that no person had been appointed to the post who had a Pass Degree was given as the reason for saying that the duties of the post could be handled by those lesser qualified and thus for doing away with the requirement of a Pass Degree, a reason on the soundness of which I refrain from commenting. The letter seems to apply the reasoning to two aspects of the matter. The first part of the paragraph seems to apply the reasoning to the decision that a Pass Degree was no longer required. The latter part beginning with 'Meanwhile' (sementara itu in the original Malay) appears to apply the reasoning to the decision not to include the post of APA in CS 8/65. But again it was not stated when the decision was reached. The only indication is in the word 'Meanwhile', which is a very convenient word for conveying chronological vagueness.

[32] I turn now to the Senior Federal Counsel's written submission on the allegation of discrimination. She says there was no unlawful discrimination because the non-inclusion of the post of APA in CS 8/65 was by reason of a valid classification done by way of management prerogative. For the classification, she refers to paragraphs 8, 9 and 10 of the respondent's affidavit in this appeal dated 19 December 2001 in which the respondent gives the reason why the post of APA was not listed in CS 8/65 and why requests for the subsequent inclusion in it of the post were rejected. The respondent says that for a 'service scheme' to be included in CS 8/65 three requirements must be fulfilled, which the service scheme for APAs did not fulfil. The first requirement was that 'the duty and responsibility of the post requires a degree holding officer' whereas 'The duty and the responsibility of the post of [APA] can be managed by a person with a qualification lower than General Degree'. The second requirement was that 'There are degree holders who are already in the scheme' whereas in the case of the post of APA 'There were no candidates holding General Degrees who were already in the post'. The third requirement was that 'In that service there is a hierarchy of post [sic] of which the superior posts do not require graduate officers' whereas in the case of APAs 'the superior post, which is Pegawai Pelindung Orang Asli, is a post which requires a degree holder officer'. Pegawai Pelindung Orang Asli is Protector of Aborigines.

[33] That was the first time that the reasons for the non-inclusion of the post of APA are given systematically in the form of three specific requirements that were not fulfilled. The second and third requirements had not been alluded to or hinted at in any of the letters that have been examined or in any affidavit in the High Court. As regards the third requirement, I must confess that I do not quite understand it or the sense of it. It seems to mean that the inferior post of APA could have been included as belonging to a Pass Degree Service if the superior post of Protector was not required to be filled by a university graduate. That, considered with the second requirement, would seem to envisage or require, for APAs to be qualified to be in the Pass Degree Service, the existence of a set-up in which there were APAs who were degree-holders but the superior officer, the Protector, was not a degree-holder. It does not seem to make sense.

[34] In view of the inconsistent and sometimes wrong reasons given in the contemporaneous letters and the fact that now a reason is given that hinges on three specific requirements, two of which have not been mentioned before, the question arises when and where those requirements were laid down. In order for the non-fulfilment of the three requirements to be the reason for the non-inclusion of the post of APA in CS 8/65 in the first place and for the subsequent refusal to add the post in the Schedule thereto, the three requirements had to exist before the Service Circular was issued. If they did not exist then, their non-fulfilment could not have been the reason for the non-inclusion of the post of APA in the Schedule and could not have been the reason for refusing to include it subsequently. For it to be accepted that those requirements did exist then, it must be shown that they did. The officer affirming the affidavit of the respondent dated 19 December 2001 would have had to rely on some recorded decision laying down the three requirements because he would have had no personal knowledge of what was laid down in the 1960s. But no documentary evidence was presented to prove the three requirements. The classification based on the three requirements is, I find, highly suspect and I must therefore find that the defence of classification to the appellants' allegation of discrimination does not avail the respondent.

[35] In her written submission, the Senior Federal Counsel argues that the appellants' acceptance of the option for the Suffian Scheme created a new contract between the appellants and the Government and that with the acceptance of the new contract the appellants were deemed to have abandoned whatever rights that they had under the old contract and could not now sue for them. The only authority cited for that proposition is *Government of Malaysia v Rohaya bte Mohd Majzub & Ors* [1989] 1 MLJ 96, but I find nothing in that case, nor in a passage at p 97E that is cited, that suggests or establishes that proposition. The position of the appellants may be put as follows. Before opting for the Suffian Scheme, they were on a particular salary scale, but they maintained that they ought to have been placed on a higher salary scale. By opting for the Suffian Scheme, they enjoyed a better salary scale than that on which they had been. But if they had been on the salary scale that they contended, they should have been on, by opting for the Suffian Scheme they would have enjoyed

an even better salary scale. They opted for the Suffian Scheme so that they would at least enjoy a better salary scale than that on which they actually were. If they did not opt for the Suffian Scheme they would lose the benefit of a better salary scale entirely. But their opting does not mean that they were satisfied with what they obtained thereby to the extent that they abandoned whatever claim they had that would give them a better still salary scale under the Suffian Scheme that they opted for. To support such a deeming of abandonment of previous rights, I would expect that reliance would be placed on some provision of CS 2/77 that implemented the scheme or some conduct of the appellants other than the mere exercise of their option under that Service Circular, but there has been no such reliance. There is no provision in CS 2/77 that says or implies that acceptance of the option is a waiver or abandonment of previous grievances. There is paragraph 11.8(b), which I render into English as follows:

> The option must be exercised outrightly (*dengan terus terang*). If a permanent officer exercises the option with objection or conditions etcetera (*dan sebagainya*) he shall be regarded as rejecting the new clean salary scale and the new conditions of service and retirement benefits under this Circular.

Apart from the fact that the Senior Federal Counsel has not placed reliance on it, the paragraph does not imply that by exercising the option the officer waives or abandons previous grievances. The most that it implies is that acceptance of the option means acceptance of the terms of CS 2/77 without grievance, complaint or reservations as to the terms. The appellants' grievance was a specific grievance that the Suffian Scheme or CS 2/77 did not set out to address.

[36] In my judgment, therefore, there is no warrant for the proposition that exercise of the option for the Suffian Scheme is a deemed abandonment of the appellants' claim to be included in CS 8/65.

[37] Finally, in her written submission the Senior Federal Counsel argues that the decision of the Public Service Tribunal was binding on the appellants and that they were therefore, on the principle of *res judicata*, barred from bringing their case to the High Court. In my judgment, the merits of the appellants' claim, which were what the High Court had to consider, were not *res judicata* because the decision of the Tribunal went only to their jurisdiction and did not go to the merits.

[38] In conclusion, I would allow the appeal with costs here and below and make the orders prayed for in paragraphs (b) to (c) of the originating summons, but subject to this qualification, that the orders are only in principle and that the actual monetary payment or adjustments that can legally be made under those paragraphs, and the quantification of any amount or the determination of any sum, including the orders to be made to give effect to any increased benefit legally due to the appellants, be determined or carried out by the Registrar of the High Court, and that for that purpose the Registrar shall take into consideration, but shall not be bound by, the computations in exhs 01 to 05 to the appellants' affidavit dated 26 September 2001, the limits of which shall not in any event be exceeded. I make this qualification because the question of the orders to be made should the appellants succeed in their

appeal and the actual benefits to which the appellants would be entitled in that event have not been examined or submitted on in this appeal, and neither have those exhibits.

Appeal dismissed.

Reported by Loo Lai Mee